21887

No. ~~21918~~

In the

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CARL SIMPSON BUICK, INC.,
Respondent.

Brief for Respondent

NATHAN R. BERKE
SEVERSON, WERSON, BERKE & BULL
433 California Street
San Francisco, California 94104
Attorneys for Respondent

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Pages

STATUTES

TEXTS

21887

No. ~~21918~~

In the

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CARL SIMPSON BUICK, INC.,
Respondent.

Brief for Respondent

STATEMENT OF THE CASE

Respondent adopts the basic statement of the case set forth in the Board's brief, pp. 2-7, subject to the additions contained in the body of this brief, and with the following exceptions. The Regional Director's administrative investigation (Board brief, p. 5-6), was conducted on an *ex parte* basis, without opportunity for the company to appear, offer evidence, cross-examine witnesses, or inspect other evidence relied on by the Regional Director. And the Board's statement that "no issues had been raised requiring a hearing before a trial examiner" (Board brief, p. 6) pre-judges one of the major questions at issue here, i.e.,

whether a material and substantial issue of fact was presented requiring a hearing on the merits. NLRB Rules & Regs. § 102.69, 29 C.F.R. § 102.69.

SUMMARY OF ARGUMENT

In selecting a unit of salesmen employed only at Respondent's place of business as "the appropriate unit" for purpose of collective bargaining, the Board relies upon the fact that no contract had ever resulted from collective bargaining on a multi-employer basis; that no union was then seeking to represent these salesmen in a multi-employer unit; and that "not many employee groups can simultaneously mount an organizing campaign among employees at [numerous] plants" (Board brief, p. 13). Although charged with the duty to select the appropriate unit "in each case" by § 9 (b) of the National Labor Relations Act (hereinafter "Act"), 29 U.S.C. § 159 (b), the Board also relies upon its rule that "absent a controlling history of bargaining on a broader basis, a single-employer unit is presumptively appropriate" (Board brief, p. 9).

The Board gave little or no weight to the following factors supporting a multi-employer unit. Respondent is and was a member of Peninsula Auto Dealers Association (hereinafter "PADA"), a 50-member association comprising automobile dealerships in the southern San Francisco Peninsula area, which had bargained collectively with union representatives of all employees, including salesmen, since 1953. On two previous occasions the Board—and on one occasion a sister local of the union here involved—determined that the multi-employer unit for the salesmen was appropriate. All PADA salesmen were covered by a health and welfare plan under the same organization administering a similar plan agreed upon between PADA

and union representatives of the remaining employees. The Board also refused to recognize that "unit findings ought not to ignore the desirability of accommodating the opportunity of employees to organize with management's ability to run its business," and that " 'there should be some minimum consideration given to the employer's side of the picture, the feasibility, and the disruptive effects of piecemeal unionization.' " *NLRB v. Purity Food Stores, Inc.,* 376 F.2d 497, 500 (1st Cir.), cert. denied, ... U.S. ....., 88 S.Ct. 337 (Nov. 13, 1967).

In view of the circumstances here presented, the Board's reliance upon relative union strength and position in making the unit determination conclusively demonstrates that it acted "arbitrarily and capriciously" in selecting the single-employer unit, *NLRB v. Merner Lumber and Hardware Co.,* 345 F.2d 770, 771 (9th Cir.), cert. denied, 382 U.S. 942 (1965), and that its decision was "controlled" by the extent of union organization in contravention of § 9 (c) (5) of the Act. 29 U.S.C. § 159 (c) (5). The Board's use of its "presumption" that single employer units are appropriate "adds nothing." *NLRB v. Purity Food Stores, Inc., supra,* 376 F.2d at 501.

Although the Board should not now be allowed to cause further delays and expense to Respondent, this matter must, at the very least, be remanded to the Board for further proceedings in view of the lack of articulated bases for its unit decision. *NLRB v. Metropolitan Life Insurance Co.,* 380 U.S. 438, 442-444 (1965).

The Board certification of the Union was improper, since it was based upon an election invalidated by the presence of a non-employee Union observer. The Board's policies specifically provide that "observers *must* be non-supervisory employees of the employer." [Emphasis supplied]

National Labor Relations Field Manual § 11310 (July, 1967 ed.). The Board has often stated that election proceedings must be conducted under "laboratory conditions," *General Shoe Corp.,* 77 NLRB 124, 126 (1948), and it, accordingly, has set aside elections where persons closely identified with the employer acted as observers. See cases cited in Board brief, p. 19. The Board has determined that, in such cases, a showing of actual interference with the free choice of any voter is "of no moment." *International Stamping Co., Inc.,* 97 NLRB 921, 923 (1951).

Since the Board must not discriminate between employers and unions in this regard, *Southwestern Elec. Service Co. v. NLRB,* 194 F.2d 939, 942 (5th Circuit 1952), since the presence of a non-employee union official acting as an observer is inherently restrictive upon the free choices of voters, since the employer made timely objection to the observer's presence, and since no rational explanation was offered or is apparent to excuse the Union's failure to select a non-supervisory employee as its observer, enforcement of the Board's order should be denied.

The Board's use of summary judgment in entering its order against Respondent renders its order unenforceable since the use of summary procedure is not authorized in, and is impliedly prohibited by, the Administrative Procedure Act, 5 U.S.C. §§ 554 (c), 556 (d), as well as by the National Labor Relations Act, 29 U.S.C. § 160 (b), and the Board's own Rules and Regulations, 29 C.F.R. §§ 102.24-102.92.

Assuming, without admitting, that the non-employee observer's presence at the election is itself insufficient to set aside the election, and even if the agency may utilize summary procedures in an unfair labor practice proceeding, it was nevertheless error to do so here. The Regional

Director's *ex parte* administrative investigation itself revealed substantial and material issues of fact as to voter intimidation by the Union observer. The Board relied upon his report in rendering its order without giving Respondent an opportunity to appear, argue, inspect evidence and cross-examine witnesses as required by due process of law and the Board's own rules. *NLRB v. Bata Shoe Co.*, 377 F.2d 821, 825, 826 (4th Cir. 1967), cert. denied, ... U.S. ....., 88 S.Ct. 238 (Oct. 23, 1967); *NLRB v. Capital Bakers, Inc.*, 351 F.2d 45, 50-52 (3rd Cir. 1965); NLRB Rules & Regs. § 102.69.

Argument

THE BOARD'S PETITION FOR ENFORCEMENT OF ITS ORDER DIRECTING RESPONDENT TO BARGAIN WITH TEAMSTERS' LOCAL NO. 960 SHOULD BE DENIED SINCE THE DETERMINATION OF THE APPROPRIATE BARGAINING UNIT, THE ELECTION AND SUBSEQUENT CERTIFICATION OF THE UNION, AND THE SUMMARY PROCEDURE USED BY THE BOARD WERE ALL IN VIOLATION OF GOVERNING LAW.

Since the unit determination, election and certification of the Union, and the summary judgment procedure exercised against Respondent were contrary to law and in excess of the Board's authority, Respondent's refusal to bargain with Teamsters' Local 960 did not constitute a violation of § 8 (a) (5) and (1) of the Act, 29 U.S.C. § 158 (a) (5) and (1).

A. In View of the History of Prior Bargaining on a Multi-Employer Basis, Previous Board-Approved Multi-Employer Unit Determinations, and the Existence of a Health and Welfare Plan Covering all Salesmen Within the Multi-Employer Unit: (1) the Multi-Employer Unit Was the Only Appropriate Unit for Purposes of Collective Bargaining; (2) the Board's Single-Employer Unit Determination Was "Arbitrary and Capricious"; and (3) the Board's Unit Determination Was "Controlled" by the Extent of Union Organization in Contravention of Section 9(c)(5) of the National Labor Relations Act.

While it is true, as pointed out by the Board, that the Board's determination of the appropriate unit for collective bargaining is "rarely to be disturbed," *Packard Motor Company v. NLRB,* 330 U.S. 485, 491 (1947), such a determination cannot be "arbitrary and capricious," *NLRB v. Merner Lumber and Hardware Co.* 345 F.2d 770, 771 (9th Cir.), cert. denied, 382 U.S. 942 (1965). Moreover, § 9 (c) (5) of the Act provides:

> "In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section, the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159 (c) (5).

Respondent contends that the Board's unit determination in this case was both arbitrary and capricious, and was "controlled" by the extent to which the petitioning union had succeeded in organizing the employees of Respondent.

The acting Regional Director found that Respondent was engaged in the retail sale and service of new and used cars and trucks; that Respondent was a member of PADA, which since 1953 had bargained with Lodge 1414, International Association of Machinists, and Teamsters Union Locals 576 and 665 as representatives of PADA employees other than salesmen; that Local 775 of the Retail Clerks International Association was designated as representa-

tive of all the PADA salesmen in 1953 pursuant to a Board-ordered election; and that in 1958 Teamsters' Local 576 was designated as the salesmen's representative within the same multi-employer unit, although no collective bargaining contract ever ensued which covered the salesmen (R.14)[1].

Although not mentioned in the Regional Director's decision, the following facts were also established. PADA is comprised of approximately 50 car and truck dealerships located on the San Francisco peninsula and bounded by Daly City on the north and Mountain View to the south *(Peninsula Auto Dealers Assn. etc.,* 107 NLRB 56 (1953); Tr. 57-58). Since 1949, the California Association of Employers has been the bargaining agent for PADA. Each member of PADA agrees in writing to be bound by the terms of any bargaining agreement made by California Association of Employers with the approval of a majority of PADA's members (E.X.4; Tr. 18, 45-47).

In 1953, the Board granted the Retail Clerks' petition to represent all of the salesmen employed by PADA members, over an intervener union's objection that only single-employer units were appropriate. *Peninsula Auto Dealers Assn., etc., supra,* 107 NLRB 56. In 1958, the Board approved a stipulation entered into between PADA and Teamsters' Local 576, which designated all salesmen employed by PADA members as the appropriate unit (Tr. 10, 22). Therefore, while no contract was agreed upon as a result of the negotiations, collective bargaining between PADA and union representatives of the salesmen took place in 1953, and again in 1958.

---

1. References designated "R." are to Volume I of the record. References designated "Tr." are to the reporter's transcript of testimony taken at the representation proceeding, Volume II of the record. References designated "E.X." are to exhibits of Respondent in the representation proceeding.

Also not mentioned in the Regional Director's decision was the fact that in August of 1963 a declaration of trust was entered into by PADA, Lodge 1414 of the International Association of Machinists, and Teamsters' Locals 576 and 665, covering a health and welfare program administered by the Motor Car Dealers Association of Northern California; and that all PADA salesmen were, at the time of the hearing, covered by a health and welfare plan administered by the same association (E.X.5; Tr. 19-20, 29-30).

In the face of these uncontroverted facts, the Board first seeks to justify its single-employer unit determination by referring to its "oft repeated and judicially approved rule that absent a controlling history of bargaining on a broader basis, a single employer unit is presumptively appropriate" (Board brief, p. 9). *NLRB v. American Steel Buck Corp.*, 227 F.2d 927, 929-930 (2nd Cir. 1955), the only court decision cited by the Board for this proposition, upheld a unit determination on the basis that "the record, as a whole, amply supports the Board's findings of fact." 227 F.2d at 929. No reference was made, expressly or impliedly, to any presumption employed by the Board. Perhaps some deference may be due to the Board's formulation of policies within the realm of its peculiar "expertise," but to canonize this policy without regard to the particular circumstances of the case is to contravene § 9 (b) of the Act which provides that "The Board shall decide *in each case*" the appropriate unit for the purposes of collective bargaining. [Emphasis supplied] 29 U.S.C. § 159 (b).

The indiscriminate use of such presumptions has been justly criticized. Note, *The Board and § 9(c)(5); Multi-location and Single-location Bargaining Units in the Insurance and Retail Industries,* 79 Harv. L. Rev. 811, 826-828 (1966). And the Supreme Court has recently denied certio-

rari in *NLRB v. Purity Food Stores, Inc.* 376 F.2d 497 (1st Cir.), cert. denied, ... U.S. ....., 88 S.Ct. 337 (Nov. 13, 1967), a case denying enforcement of a Board order under circumstances remarkably similar to those involved here, in which the Circuit Court stated that "The Board's simple declaration that single . . . units are considered 'presumptively appropriate' adds nothing . . ." 376 F.2d at 501.

The Board next seeks to avoid the importance of the now 15-year multi-employer bargaining history for all of the remaining employees of PADA members. It simply asserts its discretion to permit single-employer bargaining for certain employees, despite the presence of a larger bargaining unit in which other employees are represented.

But, while not invariably controlling, the bargaining history for one group of employees has been considered "persuasive" in determining the "question of appropriateness for every other group of employees." *NLRB v. Local 210, International Brotherhood of Teamsters, etc.,* 330 F.2d 46, 47 (2d Cir. 1964). And Board decisions have repeatedly noted the importance of this factor. See, e.g.: *Los Angeles Statler Hilton Hotel,* 129 NLRB 1349 (1961); *Joseph E. Seagram & Sons, Inc.* 101 NLRB 101 (1952); *Lone Star Producing Co.,* 85 NLRB 1137 (1949).

Moreover, the Board has consistently recognized the great importance of the same employee group's prior bargaining history in determining whether a multi-employer or single-employer unit is appropriate. See, e.g.: *NLRB v. Moss Amber Mfg. Co.,* 264 F.2d 107, 111 (9th Cir. 1959); *Travelers Ins. Co.,* 116 NLRB 387 (1956); *Berger Bros. Co.,* 116 NLRB 439 (1956); *Joseph E. Seagram & Sons, Inc., supra,* 101 NLRB 101. But the Board seeks to deprecate the fact that the salesmen within the PADA jurisdiction were represented by unions on a multi-employer basis first

in 1953 and again in 1958. It contends that this collective bargaining history is irrelevant because no bargaining contract was ever agreed upon between the PADA and the representative unions, in spite of their negotiations. The Board refines its rule to require a "successful" bargaining history, i.e., where formal collective bargaining contracts have been forthcoming.

Although the Board is charged with the duty of securing employee rights, it is not charged with the duty of seeing that every employee is covered by a formal contract, or of seeing to it that employee representatives are placed in the best possible bargaining position. See: *Amalgamated Utility Workers v. Consolidated Edison Co.,* 309 U.S. 261, 265 (1940); *NLRB v. West Texas Utilities Co.,* 214 F.2d 732, 740-741 (5th Cir. 1954). The Board's function is circumscribed by the Act, and, in determining the appropriate bargaining unit:

> "Consideration . . . should also be given to the consequences to employees similarly situated who apparently do not wish to unionize, but who would inevitably be affected, basically, by the union's activities . . . We believe, also, that there should be some minimum consideration given to the employer's side of the picture, the feasibility, and the disruptive effects of piecemeal unionization. Congress' appreciation of these factors we believe is evidenced by its passage of Section 9(c)(5) to the effect that the extent of organization is not the sole consideration." *NLRB v. Purity Food Stores, Inc.,* 354 F.2d 926, 931 (1st Cir. 1965). See Note, *The Board and Section 9(c)(5), supra,* 79 Harv. L. Rev. at 833 ff.

On remand, the Board itself "said that it was 'mindful' that unit findings ought not to ignore the desirability of accommodating the opportunity of employees to organize with

management's ability to run its business," and that it was in "complete agreement" with the principle that "there should be some minimum consideration given to the employer's side of the picture." *NLRB v. Purity Food Stores, Inc., supra,* 376 F.2d at 500.

In addition to the absence of a "successful" bargaining history, the Board points to the fact that no union is seeking to represent the salesmen on a multi-employer basis. It argues that in order to give the company's salesmen "the fullest freedom in exercising the rights guaranteed by this Act," 29 U.S.C. § 159 (b), the single-employer unit must be found appropriate because "not many employee groups can simultaneously mount an organizing campaign among employees at [numerous] plants," citing *Joseph E. Seagram & Sons, Inc., supra,* 101 NLRB at 103 (Board brief, p. 13). This marshalling of factors in support of the Board's unit determination is the clearest example of the correctness of Respondent's contention that the Board's unit determination was "controlled" by the extent of organization in violation of § 9 (c) (5) of the Act. 29 U.S.C. § 159 (c) (5). Factors used in the Board's unit approach here—the successful bargaining history requirement, the absence of a competing union, and the so-called recognition of union inability to organize large units—are all factors which are immediately or ultimately derived solely from the fact that the union has succeeded in organizing employees on a single dealership basis, while it apparently failed to do so on a multi-employer basis as did its sister local in 1958 and the clerk's union in 1953.

In *NLRB v. Metropolitan Life Insurance Company,* 380 U.S. 438 (1965), the Court approved the statutory test set forth by the National Labor Relations Board in its Twenty-Eighth Annual Report, page 51 (1963), as follows: "Al-

though extent of organization may be a factor evaluated, under Section 9 (c) (5) it cannot be given controlling weight." 380 U.S. at 442 n. 4. The interpretation to be given to the phrase "controlling weight" was set forth in the House Report on §9 (c) (5), which explicitly stated that although "The Board may take into consideration the extent to which employees have organized, this evidence should have little weight." H.R. Rep. No. 245, 80th Cong., 1st Sess. 37 (1947), quoted in Note, *The Board and Section 9(c)(5), supra,* 79 Harv. L. Rev. at 820.

Indeed, *NLRB v. Botany Worsted Mills,* 133 F.2d 876 (3rd Cir. 1943), one of the decisions criticized by the House of Representatives as being "controlled" by the extent of union organization, Note, *The Board and Section 9 (c) (5), supra,* 79 Harv. L. Rev. at 821, is analogous to the situation involved here. There, the Board had approved a unit consisting of only one department in a plant. *Botany Worsted Mills,* 27 NLRB 687 (1940). In enforcing this Order, the Court of Appeals cited the Board's reasons for its determination, which are essentially those here advanced by the Board, stating:

> "The evidence before the Board showed that at the time a majority of the sorter-trapper group manifested its desire for collective bargaining through union membership, the majority of the other employees of Botany did not belong to any union and that no labor organization had petitioned the Board for certification as the representative of the employees on a plant wide basis. The Board expressed the belief that the rights of the unit selected as appropriate should not have to be contingent upon what other employees in other parts of the plant did. There was evidence indicating that the unit designated was suffiently distinct from other groups of employees so as to make its selection as a separate unit feasible. The sorters or

> trappers worked in a part of the plant entirely or partly set apart from the process in which they are engaged and this department has its own supervisors. There is no interchange of employees engaged in sorting or trapping, except to the extent that when the process was changed 12 former sorters were transferred to other departments. We do not see any basis upon which the designation of the bargaining unit by the Board in this case should be interfered with by this Court." 133 F.2d at 880-881.

If, as the Board apparently now contends, it is precluded from weighing extent of organization in determining an appropriate unit *only* when it is the *sole* basis for the unit determination, the Board will have effectively succeeded in subverting the purposes of § 9(c)(5). The Board considers numerous other factors in determining the appropriate unit. Included, *inter alia,* are the employer's form of business organization, the history of labor relations, the form of present or past organization, eligibility of membership in the organization, employee desires, employee mutual interests, multi-employer organization and *modus operandi,* geographical distribution, and bargaining custom in the industry. Respondent submits that it would be a very rare case indeed in which one or more of these other factors, however insignificant they might be under the circumstances, could not be found to support a unit determination which in fact is based primarily upon the extent of union organization. See, generally: Note, *The Board and Section 9 (c) (5), supra,* 79 Harv. L. Rev. 811; CCH Labor Law Course ¶¶ 2075-2086.

On page 15 of its brief, the Board states that, assuming the multi-employer unit to be appropriate, "this would not put into question the propriety of the single-employer unit which the Union sought. There is no concept of a 'more'

or 'most' appropriate unit." The Board's brief apparently suggests that the Board is therefore bound by § 9(c)(5) only in determining whether a unit is "an" appropriate unit, and that it is not so bound in choosing "from among several appropriate units." This contention requires a strained and unnatural reading of the statute. The duty of the Board is to select *the* appropriate unit in each case, Act § 9(b); 29 U.S.C. § 159(b), and it is this determination alone which establishes the ultimate bargaining relationship of the parties. To impute an intent on the part of Congress not to apply § 9(c)(5) in the ultimate determination of the unit finds no basis in reason, legislative history, or the language of the Act.

Moreover, the absence of an articulated statement by the Board that its decision is determined by the extent of union organization is clearly immaterial in considering whether its decision was, in fact, so controlled. See *NLRB v. Metropolitan Life Ins. Co.,* 380 U.S. 438, 442 (1965), vacating and remanding *Metropolitan Life Ins. Co. v. NLRB,* 327 F.2d 906, 909-911 (1st Cir. 1964).

Respondent, therefore, contends that the Board has not only chosen an inappropriate unit in this case and that its determination is "arbitrary and capricious", but that it has acted in derogation of § 9(c)(5) under any of the tests of "controlling" which can reasonably be supported in light of the language and legislative history of that section. All but one of the arguments advanced by the Board to justify its unit determination are based upon the extent of Union organization; the remaining "presumption" favoring single-employer units "adds nothing". The factors favoring a PADA association-wide unit need not be repeated. And perhaps the most telling fact compelling denial of enforcement here is that in 1953 the Board rejected the demand

of Teamster Local 111 for a single unit, and designated the association-wide unit as appropriate. *Peninsula Auto Dealers Assn., etc., supra,* 107 NLRB 56. See *NLRB v. Groendyke Transport, Inc.,* 372 F.2d 137, 141, (10th Cir. 1967). Since 1953, the only changed circumstances which have arisen, exclusive of the extent of union organization, is the history of collective bargaining by representatives of the salesmen on a multi-employer basis on two separate occasions, and continued bargaining on that basis for all other employees of PADA members.

At the very least, this matter should be remanded to the Board for further proceedings in view of the lack of articulated bases for its decision. In *NLRB v. Metropolitan Life Ins. Co.,* 380 U.S. 438 (1965), Justice Goldberg, writing for the Court, noted that the Board stated the grounds for its unit determination as follows:

> " 'The Employer has eight district offices and two detached offices in Rhode Island, and has only one district office in Woonsocket. The nearest district office is located 12 miles away in Pawtucket. In the prior proceeding . . ., we found that each of the Employer's individual district offices was in effect a separate administrative entity through which the Employer conducted its business operations, and therefore was inherently appropriate for purposes of collective bargaining . . . [W]e find that, since there is no recent history of collective bargaining, no union seeking a larger unit, and the district office sought is located in a separate and distinct geographical area, the employees located at the Woonsocket district office constitute an appropriate unit.' " 380 U.S. at 442 n. 5.

The Supreme Court went on to state, at pp. 442-444:

> ". . . due to the Board's lack of articulated reasons for the decisions in and distinctions among these cases, the Board's action here cannot be properly reviewed.

> When the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp. v. National Labor Relations Board,* 313 U.S. 177, 197."

Both here and in *Metropolitan Life,* the Board failed to adequately explain its departure from prior decisions. In the instant case, the Board's articulated reasons for its decision fall far short of the expressed bases on which the Board rendered its order in the *Metropolitan Life* case, and which the Supreme Court found wanting. But here, the Board has had ample opportunity to review its decision following the publication of the Supreme Court's opinion in *Metropolitan Life.* It should not now be allowed to revise and restate its Order, thereby causing further delays and expense. Compare *NLRB v. Purity Food Stores, Inc., supra,* 354 F.2d 926 (remand to Board), with *NLRB v. Purity Food Stores, Inc., supra,* 376 F.2d 497 (enforcement denied). As stated by Justice Douglas in his dissenting opinion in *Metropolitan Life,* 380 U.S. at 444:

> "A reading of the court's opinion reveals the fallacies on which the Board proceeded. The employer sought review of the Board's Order, asking that it be set aside. Concededly it should be. But we need not act as amicus for the Board, telling it what to do. The Board is powerful and resourceful and can start over again should it wish . . . Neither of the parties asks for a remand. They are willing to stand or fall on the present record; and we should resolve the controversy in that posture."

B. The Election Was Invalid Since the Board Allowed a Non-Employee Union Officer to Act as the Union's Observer Contrary to the Board's Own Rules, and Over Respondent's Timely Objection.

Over Respondent's objection at the pre-election conference, the Union was permitted to designate as its election observer a Union official who was not an employee of the Company (R. 31, 34).

The Rules and Regulations and Statement of Procedure of the Board provide, in § 102.68, that "any party may be represented by observers of his own selection, subject to such limitations as the Regional Director may prescribe." 29 C.F.R. § 102.68. Section 11310 of the National Labor Relations Field Manual (July, 1967 ed.), made available to the public by the Public Information Act, P.L. 90-23, 81 Stat. 54 (1967), states that "observers *must* be non-supervisory employees of the employer, unless a written agreement by the parties provides otherwise." [Emphasis supplied]. The failure of the Board to conform to its own standards in this respect is particularly glaring in light of its affirmation that:

> "Our function, as we see it, is to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice." *Sewell Manufacturing Co.,* 138 NLRB 66, 70 (1962);

and that

> "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.

> It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault . . ., or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again." *General Shoe Corp.,* 77 NLRB 124, 126 (1948).

It is true that the cases cited by the Board support its position that the use of an employee observer who is also a paid union official or organizer will not be deemed sufficient in and of itself to void an election (Board brief, p. 18). But these cases do not, as stated by the Board, have any bearing upon whether a *non-employee* union official may properly act as a watcher at the election polls. All of the decisions cited by the Board involved union observers who were in fact employees of the employer. *NLRB v. Zelrich,* 344 F.2d 1011, 1014-1015 (5th Cir. 1965) (recently fired employee subject to reinstatement because of employer unfair labor practice in his dismissal); *Shoreline Enterprises of America,* 114 NLRB 716, 718-719 (1955) (employee), enforcement denied, *Shoreline Enterprises of America, Inc. v. NLRB,* 262 F.2d 933 (5th Cir. 1959); *Huntsville Mfg. Co.,* 99 NLRB 713, 730 (1952) (employee), enforced *NLRB v. Huntsville Mfg. Co.,* 203 F.2d 430 (5th Cir. 1953). In fact, the Board has refused to overturn a Regional Director's decision precluding the use of non-employee union observers, even where the union was unable to secure volunteers from among the employees. *Jat Transportation Corp.,* 131 NLRB 122, 125-126 (1961).

It is also true, as pointed out by the Board (brief, pp. 19-20), that "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." *NLRB v. Waterman S.S. Corp.,* 309 U.S.

206, 226 (1940). However, the Supreme Court there also said that it was "the intention of Congress to apply an orderly, informed and specialized procedure to the complex, administrative problems arising in the solution of industrial disputes." 309 U.S. at 208. See *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330-331 (1946). The function of the Courts in reviewing the validity of representation elections was elaborated by the Seventh Circuit:

> "Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board." *Celanese Corp. of America v. NLRB,* 291 F.2d 224, 225 (7th Cir. 1961).

Respondent is not contesting the validity or applicability of the Board's ruling that observers must be chosen from among employees of the employer. On the contrary, Respondent contends that once a procedure has been adopted by the Board it cannot with impunity disregard what it has determined to be "an orderly, informed and specialized procedure." Certainly such a departure from its ordinary procedures is unwarranted where there are no unusual factors which would affect the applicability of its rules and where the contesting party, as here, made timely and sufficient demand for compliance with the procedure at the pre-election conference. Cf. *NLRB v. Huntsville Mfg. Co., supra,* 203 F.2d at 434. The Board can hardly contend that observers favorable to the union were not available from among the employees, in view of the election results in favor of the Union. Moreover, the primary purpose for providing election observers chosen by organizations appearing on the ballot is to identify and make certain that those voting are qualified to do so. See: *NLRB v. West Texas Utilities*

Co., 214 F.2d 732 (5th Cir. 1954); *Balfre Gear & Mfg. Co.*, 115 NLRB 19 (1956); NLRB "Instructions to Election Observers", Form NLRB-722, LRX 4309. A union official employed in another county is scarcely competent to exercise these functions.

The Board also argues that Respondent must have made some particular showing of special circumstances, such as improper electioneering by the Union observer, in order to find that his presence tainted the election process. But Respondent contends that the mere presence of such an observer compels the inference that a free election was thereby precluded. Election observers watch the employees as they come to vote, check off their names on the eligibility list, challenge them if they so desire, and watch the voters deposit their ballots in the ballot box. When the observer is an "outsider" unknown to the employees, and who obviously represents the Union, his mere presence must be deemed to arouse sufficient fears among the voters to void the election. The Regional Director's observation that Banner wore no Union insignia is of little, if any, weight in view of the Board's prior recognition that, even in the absence of labels, the affiliation of election observers is "generally well known to the employees." *Western Electric Co., Inc.*, 87 NLRB 183, 185 (1949). See *Firestone Tire & Rubber Co.*, 120 NLRB 1644 (1958). The Board itself has rejected the requirement that a specific showing of intimidation be made. In *International Stamping Co., Inc.*, 97 NLRB 921 (1951) it set aside an election and directed that a new election be held where the employer's observers were the son and sister-in-law of the employer's president. There, the Board declared:

> "In the interest of free elections, it has long been the Board's policy to prohibit persons closely identified with an Employer from acting as observers . . . *the fact that there is no showing of actual interference*

with the free choice of any voter or that no objection was raised at the time of the election *is of no moment.*

"As this Board said in a closely related situation, 'confidence in, and respect for established Board election procedures cannot be promoted by permitting the kind of conduct involved herein to stand.' [Peabody Engineering Co., 95 NLRB 952] Election rules which are designed to guarantee free choice must be strictly enforced against material breaches in every case, or they may as well be abandoned. We believe that the purposes of the Act would best be served by setting aside the instant election and directing a new one." [Emphasis supplied] 97 NLRB at 923.

The Board has repeatedly upheld the refusal of its Regional Directors to allow persons closely identified with the employer to act as its observer, and has set aside elections where such an observer has been used at the polls. See cases cited in Board brief, p. 19. And in *Southwestern Electric Service Co. v. NLRB,* 194 F.2d 939 (5th Cir. 1952), the court found that where a union official, not an employee of the company at which a certification election was being held, appeared and talked to voters in the polling area, the election would have to be set aside. Although the blatant electioneering on the part of the union official in that case may be absent in this, here the union official was not only present at the polling place, but was wearing an official observer's badge, thereby being clothed with a measure of respectability and implied Board approval not present in the *Southwestern Electric* case.

But the Board now seeks to explain the discrimination in its treatment of employer and union observers by stating that the courts have agreed that "generally union spokesmen may be distinguished from managerial officials, for the latter's immediate power to alter working condition[s] raises a risk of subtle pressures during the voting process"

(Board brief, p. 18). It is true that the Board itself has taken this position, but no court decisions favoring such a distinction have been cited. In fact, the Court in *Southwestern Electric Service Co. v. NLRB, supra,* 194 F.2d at 942, stated:

> "If the tables were turned, and a representative of the Company had done exactly what was done here, with a result favorable to the employer, the election should be set aside; and the *same rule* must apply in this case, where a free and fair election was interfered with by the activities of the union representative within the prohibited area." [Emphasis supplied]

The Board's view of the relative abilities of employers and unions to apply "subtle pressures during the voting process", and its application of stricter standards for the employer have been characterized as outdated and worthy of being discarded. Note, 38 Temple L.Q. 288, 298 (1965). And the fact that the election has been conducted at "considerable pains and expense" to the Board (R. 35) is also irrelevant. This is particularly true where, as here, the company made its objection known when first advised of the observer's identity, and in ample time to allow compliance with the Board's policy.

To here sanction the use of the non-employee Union observer and approve the certification of a bargaining representative based upon the election would run counter to the purposes and policies inherent in a democratic administrative process. The Field Manual provides that observers *must* be selected from among the non-supervisory employees of the employer, and this procedure has been consistently applied by the Board. See Kammholz and McGuiness, ALI Practice and Procedure before the NLRB, p. 35 (1962). The Board has repeatedly stated that elec-

tions are to be conducted under "laboratory" conditions. Observers closely identified with the employer have been precluded from serving as observers, and elections conducted in their presence have been set aside. Respondent made timely and repeated objections to the presence of this observer. No rational explanation was offered or is readily apparent to excuse the failure to select a non-supervisory employee as the Union's observer. In view of the foregoing, the Board's petition for enforcement should be denied.

C. The Board's Use of Summary Judgment Procedure in Rendering Its Order Was Improper.

As stated above, Respondent objected at the pre-election conference to the Regional Director's allowance of a non-employee to serve as the Union observer. After the election, a formal objection was lodged which was overruled by the Regional Director after an *ex parte* administrative investigation (R. 31, 33). The company's request for review of the decision was summarily denied by the Board, as was its request for reconsideration of the denial (R. 37, 42, 43, 45).

Respondent refused to bargain with the Union certified by the Board and consequently a complaint was issued charging Respondent with an unfair labor practice (R. 50). Respondent answered, generally denying the allegations of the complaint (R. 56). Thereupon, and before the scheduled hearing set for July 12, 1966, the General Counsel sought and obtained a "summary judgment" against Respondent (R. 86).

In support of its motion for summary judgment, General Counsel directed the Board's attention to the Supplemental Decision and Certification of Representative issued by the

Regional Director (R. 76; R. 33), wherein the Regional Director found that Wallace L. Banner, Jr., served as the Union's observer at the elections; that the Employer objected thereto; and that the Board agent permitted Banner to serve in spite of the objection. The Regional Director also found that Banner was an elected vice-president and member of the Union's executive board, and that he was employed as an automobile salesman in San Francisco, outside the geographical limits of PADA (R. 34; Tr. 57-58). The Regional Director determined, on the basis of his findings that Banner wore no Union insignia and that he spoke to none of the voters in the course of the election, that "the Employer's objection therefore is found to be without merit." (R. 34-35).

1. NEITHER THE ADMINISTRATIVE PROCEDURE ACT, THE NATIONAL LABOR RELATIONS ACT, NOR THE BOARD'S OWN RULES AND REGULATIONS AUTHORIZE THE BOARD'S USE OF A SUMMARY JUDGMENT PROCEDURE IN AN UNFAIR LABOR PRACTICE PROCEEDING.

The Administrative Procedure Act, National Labor Relations Act, and the Board's own Rules and Regulations and Statement of Procedure make no mention of, or provision for, the disposition of matters by the use of summary judgment proceedings. In fact, the use of this extraordinary procedure is impliedly prohibited.

Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554, sets forth general requirements for adjudicatory proceedings required to be determined on the record after an opportunity for agency hearing. And § 7(c) provides that where hearings are required thereunder by § 5:

> "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d).

Section 10(b) of the National Labor Relations Act requires that an unfair labor practice complaint contain a "notice of hearing before the Board . . . or before a designated agent or agency," and the person against whom the complaint is issued is given the right "to appear in person or otherwise and give testimony." 29 U.S.C. § 160(b). See: *Amalgamated Utility Workers v. Consolidated Edison Co.,* 309 U.S. 261, 264 (1940); *Marine Engineers' Beneficial Assn. v. NLRB,* 202 F.2d 546, 548-549 (3rd Cir. 1953).

Respondent's contention is further supported by the fact that in adjudicatory agency proceedings, questions of policy are often presented upon which the Board does and should receive arguments and statements of counsel. See 1 Davis, Administrative Law §§ 7.02, 7.07 (1958). In recognition of this fact, the Administrative Procedure Act provides that:

> "The agency shall give all interested parties opportunity for—(1) the submission and consideration of facts, *arguments,* offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit. . . ." [Emphasis supplied] 5 U.S.C. § 554(c).

The Board relies upon its rules providing generally for pre-hearing motions in order to support its use of motions for summary judgment. NLRB Rules & Regs., § 102.24, 29 C.F.R. § 102.24. However, a perusal of §§ 102.28 and 102.92 of the Rules and Regulations clearly demonstrates that the motions allowed in § 102.24 refer only to procedural matters not affecting the ultimate disposition on the merits. 29 C.F.R. §§ 102.28, 102.92. Moreover, § 102.27 specifically provides for a motion to dismiss the entire complaint, and § 102.26 provides that unless otherwise expressly authorized, rulings on motions by the Regional Director or Trial Examiner "shall not be appealed directly to the Board

except by special permission of the Board, but shall be considered by the Board in reviewing the record . . .," thereby indicating the exclusion of the extraordinary motion for a summary judgment under § 102.24. 29 C.F.R. §§ 102.24, 102.26, 102.27.

Even if allowed by the Administrative Procedure Act and the National Labor Relations Act, Respondent contends that, at least in the absence of a Board rule duly adopted pursuant to 5 U.S.C. § 553, the Board may not use the extraordinary procedure of summary judgment.

2. EVEN IF THE BOARD MAY RENDER SUMMARY JUDGMENT ON AN UNFAIR LABOR PRACTICE COMPLAINT, IT WAS ERROR TO DO SO WHERE SUBSTANTIAL AND MATERIAL ISSUES OF FACT WERE PRESENTED TO THE BOARD.

If this Court should find that the Board may properly utilize summary procedure, in spite of the absence of statutory authority and the lack of opportunity on the part of Respondent for cross-examination and presentation of oral argument, it is still clear that such a procedure conforms to the requirements of due process only where no disputed issues of material fact are presented. See, e.g.: *Macomb Pottery Co. v. NLRB,* 376 F.2d 450, 452 (7th Cir. 1967).

Respondent, admittedly, could have proferred no evidence in the unfair labor practice proceeding on the question of the proper unit determination which was not available to it at the pre-election hearing. However, Respondent submits that there were genuine and material issues of fact presented as to the validity of the election and subsequent certification of the Union representative based upon Respondent's objections to the use of the non-employee Union observer at the polls. As to this issue, the Board's order was rendered solely upon the basis of the Regional Director's supplemental decision and certification. This

decision was rendered upon the Regional Director's *ex parte* administrative investigation under § 102.69 of the Rules and Regulations, 29 C.F.R. § 102.69, which was conducted without opportunity for Respondent to be heard, to present evidence, or to cross-examine persons giving testimony to the Regional Director.

This Court has repeatedly warned of the dangers of entering summary judgment in civil actions under Fed. R. Civ. P. 56, referring to it as a "drastic remedy", *Consolidated Electric Co. v. United States,* 355 F.2d 437, 438 (9th Cir. 1966), to be rendered only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). And:

> "An issue of fact may arise from inferences to be drawn from the evidence, and all doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment." *United States ex rel. Austin v. Western Electric Co.,* 377 F.2d 568, 572 n. 11 (9th Cir. 1964). See also: *Cameron v. Vancouver Plywood Corp.,* 266 F.2d 535, 539 (9th Cir. 1959); *Hoffman v. Babbit Brothers Trading Co.,* 203 F.2d 636, 638 n. 1 (9th Cir. 1953); Wright, Federal Courts § 99 (1963).

At the very least, the presence of a non-employee Union observer at the election polls gives rise to the inference that the election was not conducted under the "laboratory" conditions so frequently espoused by the Board.

Remarkably similar issues were presented to the Third Circuit in the case of *NLRB v. Capital Bakers, Inc.,* 351 F.2d 45, 50-52 (3d Cir. 1965). There, the question involved respondent company's objection to the union's election challenge of an employee. After noting the provisions of

the Board's Rules and Regulations, § 102.69(c), providing that the Regional Director may conduct a hearing where substantial and material factual issues are presented, the Court found that the Regional Director's report itself established the existence of such "substantial and material factual issues." 29 C.F.R. § 102.69(c). And the Court declared that "all of the evidence upon which he relied is derived from statements which were not subject to cross-examination or confrontation or to any legal tests for determining their use or weight as evidence." 351 F.2d at 50. Then, after citing the provisions for a hearing contained in § 10(b) of the Act and § 102.69(e) of the Rules and Regulations, the Court stated:

> "It is apparent that the status of the employee whose ballot was challenged presents a substantial factual issue. The extent of the Regional Director's discussion of facts attests to its substance . . . Therefore, the failure to determine this issue on the basis of a hearing constitutes a clear abuse of discretion on the part of the Regional Director, which has been allowed to stand at the successive stages of the proceedings on the grounds that the original determination was not open to subsequent review. Not only the Rules and Regulations, but due process of law demands that a hearing be held on this contested factual issue at some stage of the administrative proceeding before respondent's rights can be affected by an enforcement Order." *NLRB v. Capital Bakers, Inc., supra,* 351 F.2d at 51. Accord: *NLRB v. Bata Shoe Co.,* 377 F.2d 821, 825-826 (4th Cir. 1967); *NLRB v. Lamar Elec. Membership Corp.,* 362 F.2d 505 (5th Cir. 1966); *International Ladies Garment Workers Union v. NLRB,* 339 F.2d 116, 124-125 (2nd Cir. 1964); *NLRB v. Air Control Products of St. Petersburg, Inc.,* 335 F.2d 245, 249 (5th Cir. 1964); *NLRB v. Ideal Laundry and Dry Cleaning Co.,* 330 F.2d 712, 715-716 (10th Cir. 1964); *NLRB v. Joclin Mfg. Co.,* 314 F.2d 627, 630-633 (2nd

Cir. 1963); *NLRB v. Lord Baltimore Press, Inc.*, 300 F.2d 671 (4th Cir. 1962); *NLRB v. Poinsett Lumber & Mfg. Co.*, 221 F.2d 121 (4th Cir. 1955); *NLRB Rules and Regulations* § 102.69, 29 C.F.R. § 102.69. Cf. *NLRB v. Sun Drug Co.*, 359 F.2d 408 (4th Cir. 1966).

§ 102.69(c) of the NLRB Rules and Regulations provides, in part, that the Regional Director's decision on objections to election "may be . . ., if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer. . . ." 29 C.F.R. § 102.69(c). But:

> "The Board properly has not contended either that the Regulations' use of the phrase 'appears to the Board' makes its determination conclusive . . ., or that their use of the verb 'may' gives it an unfettered discretion to grant or deny a hearing. . . ." *NLRB v. Joclin Mfg. Co., supra,* 314 F.2d at 621.

Here, the Regional Director's investigation "itself reveals . . . that material factual issues exist which can be resolved only by a hearing," *U.S. Rubber Co. v. NLRB,* 373 F.2d 602, 606 (5th Cir. 1967), in that the observer was one of the Union's officers who was not an employee of respondent company. If the use of such an observer is not sufficient in and of itself to void the election, and even if, as contended by the Board, special circumstances such as improper electioneering are necessary to set aside the election, the presence of such an observer must be held to establish a *prima facie* showing of such "special circumstances" sufficient to require a hearing. See: *NLRB v. Bata Shoe Co., supra,* 377 F.2d at 826; *NLRB v. Lamar Elec. Membership Corp., supra,* 362 F.2d at 508; *Jat Transportation Corp., supra,* 131 NLRB 122.

At the very least, then, Respondent must be given the opportunity to confront and cross-examine witnesses and inspect evidence relied upon by the Regional Director in making his *ex parte* investigation and report, which in turn was relied upon by the Board in entering its summary judgment. *NLRB v. Indiana and Michigan Elec. Co.,* 318 U.S. 9, 28 (1943); *NLRB v. Poinsett Lumber & Mfg. Co., supra,* 221 F.2d at 123.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Board's petition for enforcement of its order should be denied or, in the alternative, that this matter should be remanded to the Board for further proceedings in light of *NLRB v. Metropolitan Life Ins. Co., supra,* 380 U.S. 438, and for hearing on Respondent's objections to the election in accordance with NLRB Rules and Regulations § 102.69 (c), 29 C.F.R. § 102.69(c).

Dated: December 28, 1967

Respectfully submitted,

Severson, Werson, Berke & Bull

Nathan R. Berke

By Nathan R. Berke

Attorneys for Respondent

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Nathan R. Berke

Attorney